RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-658

In the Supreme Court of the United States

CHARMAINE HAMER,
Petitioner,

v.

NEIGHBORHOOD HOUSING SERVICES OF CHICAGO & FANNIE MAE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

A district court may extend the time to file a notice of appeal in a civil case "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, . . . upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). Here, upon timely motion, the district court extended the time from October 14, 2015 to December 14, 2015 for Petitioner Charmaine Hamer ("Ms. Hamer") to file a notice of appeal. Ms. Hamer filed a notice of appeal within the time set by the district court. The United States Court of Appeals for the Seventh Circuit nevertheless *sua sponte* dismissed the appeal for lack of jurisdiction. In doing so, the Seventh Circuit concluded that it was deprived of jurisdiction because Ms. Hamer's notice of appeal was filed outside the time permitted by the Federal Rules of Appellate Procedure, which provide that "[n]o extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later." Fed. R. App. P. 4(a)(5)(C).

The question presented is as follows:

Whether Federal Rule of Appellate Procedure 4(a)(5)(C) can deprive a court of appeals of jurisdiction over an appeal that is statutorily timely, or whether Federal Rule of Appellate Procedure 4(a)(5)(C) is instead a nonjurisdictional claim-processing rule because it is not derived from a statute, and therefore subject to forfeiture or waiver by an appellee, or subject to equitable considerations such as the unique-circumstances doctrine.

PARTIES TO THE PROCEEDING

Petitioner is Charmaine Hamer. Ms. Hamer was plaintiff-appellant below.

Respondents are Neighborhood Housing Services of Chicago and Fannie Mae. Both were defendants-appellees below.

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OPINIONS BELOW

The decision of the Seventh Circuit (Pet. App. 1-4) is reported at 835 F.3d 761 (7th Cir. 2016). The district court's summary-judgment decision (Pet. App. 7-47) is reported at 2015 WL 5439362 (N.D. Ill. Sept. 10, 2015). The district court's entry of judgment is found at Pet. App. 48-49. The district court's order extending Ms. Hamer's time to file a notice of appeal is found at Pet. App. 60.

JURISDICTION

The judgment of the Seventh Circuit was entered on August 31, 2016. Pet. App. 5-6. No petition for rehearing was filed. Ms. Hamer's petition for a writ of certiorari was timely because it was filed on November 15, 2016—within ninety days of the Seventh Circuit's entry of judgment. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1. On February 27, 2017, this Court granted Ms. Hamer's petition for a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The current version of 28 U.S.C. § 2107, as well as Federal Rule of Appellate Procedure 4(a),[1] are reproduced at Pet. App. 50-56. The 1988 version of 28 U.S.C. § 2107 is reproduced at Stat. App. 1a. The 1991 amendments to 28 U.S.C. § 2107 are reproduced at

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[1] The appendix to the petition for a writ of certiorari contains the version of Federal Rule of Appellate Procedure 4(a) that was in effect until December 1, 2016. The December 1, 2016 amendments to the Federal Rules of Appellate Procedure make no change to Rule 4(a)(5)(C)—the provision at issue in this case.

Stat. App. 2a-3a. Pertinent portions of the House Report concerning the 1991 amendments to 28 U.S.C. § 2107 are reproduced at Stat. App. 4a-15a. The 2009 amendment to 28 U.S.C. § 2107 is reproduced at Stat. App. 16a-17a. The 2011 amendments to 28 U.S.C. § 2107 are reproduced at Stat. App. 18a-21a.

STATEMENT OF THE CASE

I. Proceedings in the District Court

In 2012, after Ms. Hamer was terminated from her position as Intake Specialist for the Neighborhood Housing Services of Chicago and Fannie Mae's Mortgage Help Center (together "Respondents"), Ms. Hamer filed suit in the United States District Court for the Northern District of Illinois against Respondents for violating the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Pet. App. 1-2; Pet. App. 7; Pet. App. 22. The district court had jurisdiction under 28 U.S.C. § 1331, 29 U.S.C. § 626(b), and 42 U.S.C. § 2000e-5(f)(3).

On September 10, 2015, the district court granted summary judgment in favor of Respondents and directed the entry of judgment accordingly. Pet. App. 7-47. Final judgment was entered on September 14, 2015.[2] Pet. App. 48-49. Accordingly, in the absence of

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[2] Although the district court's summary-judgment decision and final judgment are dated September 10, 2015, neither was entered in the district court's docket until September 14, 2015. Pet. App. 7; Pet. App. 48. Therefore, the due date for filing a notice of appeal is calculated from September 14, 2015, the day that the judgment was entered. Fed. R. App. P. 4(a)(1)(A); *see also* Fed. R. Civ.

an extension of time, a notice of appeal was due by October 14, 2015. Fed. R. App. P. 4(a)(1)(A) (providing that a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from").

After judgment was entered, Ms. Hamer and her court-appointed counsel disagreed on an appellate strategy. Therefore, on October 8, 2015—before the deadline to file a notice of appeal—Ms. Hamer's counsel filed and served on all parties a motion seeking: (i) to withdraw as counsel, and (ii) an extension of time until December 14, 2015 for Ms. Hamer to file a notice of appeal. Pet. App. 57-59. In seeking the extension of time, Ms. Hamer's counsel relied on 28 U.S.C. § 2107(c), which permits a district court, "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, [to] extend the time for appeal upon a showing of excusable neglect or good cause." Pet. App. 51; Pet. App. 57-58. In this motion, Ms. Hamer's counsel explained that Ms. Hamer needed additional time to secure appellate counsel and to determine an appropriate appellate strategy. Pet. App. 58. The district court granted the motion that same day,[3] permitting Ms. Hamer's counsel to withdraw and expressly stating that "[t]he Court will give [Ms. Hamer] until December 14, 2015 to file a Notice of Appeal." Pet. App. 60. From then on, Ms. Hamer proceeded *pro se* in the district court, as she was unable to retain appellate counsel that she could

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P. 58(c)(2)(A) (providing that a judgment is deemed entered when a judgment, set out in a separate document, is entered in the civil docket under Federal Rule of Civil Procedure 79(a)).

[3] This order was entered in the docket on October 9, 2015.

afford. Respondents did not challenge the extension of time that the district court granted. In particular, Respondents neither: (i) argued to the district court that an extension of time until December 14, 2015 violated Rule 4(a)(5)(C), nor (ii) filed a notice of appeal to challenge the length of the extension of time that the district court granted.

On December 11, 2015—within the time set by the district court—Ms. Hamer filed a notice of appeal to the United States Court of Appeals for the Seventh Circuit. Pet. App. 61. Respondents did not file a notice of cross-appeal to challenge the length of the extension of time that the district court granted.

II. Proceedings in the Seventh Circuit

Ms. Hamer proceeded *pro se* throughout her appeal before the Seventh Circuit. After the docketing of Ms. Hamer's appeal, Respondents submitted a Joint Corrected Docketing Statement in which Respondents noted, among other things, that "[o]n December 11, 2015, [Ms. Hamer] timely filed a Notice of Appeal[.]" Pet. App. 64; *see also* Pet. App. 63 ("The . . . Seventh Circuit has jurisdiction over this appeal . . . in that on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal[.]"). Nevertheless, the Seventh Circuit *sua sponte* requested that Respondents file a memorandum addressing the timeliness of Ms. Hamer's appeal. Pet. App. 66-67. Specifically, the Seventh Circuit requested that Respondents address whether Federal Rule of Appellate Procedure 4(a)(5)(C) precluded consideration of Ms. Hamer's appeal, and stated that "the time to appeal expired on October 14, 2015, permitting the district court to extend the time to appeal until November 13, 2015, but no later." Pet. App. 67. In

response to the Seventh Circuit's order, Respondents—although seeking dismissal on nonjurisdictional grounds—admitted that Rule 4(a)(5)(C) cannot divest the Seventh Circuit of jurisdiction because this Rule does not derive from a statute. Pet. App. 71-77. After Ms. Hamer responded to Respondents' memorandum, the Seventh Circuit deferred consideration of the issue until after merits briefing. Pet. App. 91-93.

After merits briefing and oral argument, the Seventh Circuit held—contrary to the arguments of all parties—that the timing of Ms. Hamer's notice of appeal divested the Seventh Circuit of jurisdiction to hear the case.[4] Pet. App. 1-4. Relying on this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the Seventh Circuit concluded that Federal Rule of Appellate Procedure 4(a)(5)(C) "limits a district court's authority to extend the notice of appeal filing deadline to no more than an additional 30 days [from the original deadline to file a notice of appeal]," and that "[a]lthough . . . Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal, this Court simply has no authority to excuse the late filing or to create an equitable exception to jurisdictional requirements." Pet. App. 4. Because the Seventh Circuit concluded that it lacked jurisdiction, it

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[4] The Seventh Circuit's decision incorrectly states that Respondents had "argu[ed] . . . that [the Seventh Circuit] lacks jurisdiction over [Ms. Hamer's] appeal." Pet. App. 2. To the contrary, Respondents, while seeking dismissal on nonjurisdictional grounds, argued extensively that noncompliance with Rule 4(a)(5)(C) could not deprive the Seventh Circuit of jurisdiction over the appeal. Pet. App. 71-77.

never reached the merits of Ms. Hamer's appeal. Moreover, due to this jurisdictional determination, the Seventh Circuit concluded that forfeiture and waiver could not excuse noncompliance with Rule 4(a)(5)(C), and that equitable considerations could not play any part of the analysis. Pet. App. 4.

SUMMARY OF THE ARGUMENT

This Court's precedents—as well as the text and history of 28 U.S.C. § 2107(c)—demonstrate conclusively that Federal Rule of Appellate Procedure 4(a)(5)(C) does not contain a jurisdictional timing requirement. This Court has long held that court-promulgated rules that do not derive from a statute cannot constitute a limitation on a court's jurisdiction. Here, not only does the requirement set forth in Rule 4(a)(5)(C) lack a statutory basis, but the 1991 amendments to § 2107 specifically repealed the provision that provided a maximum extension of time that a district court could grant for a party to file a notice of appeal. Since then, no federal statute has set a maximum amount of time that a district court may grant for a party to appeal, so long as a motion for an extension of time to appeal is filed no later than 30 days after the expiration of the original time to appeal. Accordingly, Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, and the Seventh Circuit erred in concluding that it lacked jurisdiction over the appeal. The Seventh Circuit's judgment should therefore be reversed.

Because Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, the Rule can be forfeited or waived by an appellee. This Court has long recognized that a party may forfeit the right to rely on a

nonjurisdictional claim-processing rule if that party waits too long to bring a violation of the rule to a court's attention. This Court has also recognized that a party may waive the right to invoke a nonjurisdictional claim-processing rule. For several reasons, Respondents here forfeited and waived their right to seek dismissal of Ms. Hamer's appeal based on any violation of Rule 4(a)(5)(C).

First, Respondents committed forfeiture by failing to raise the issue to the district court. Had Respondents objected to the length of the extension, the district court could have considered whether to grant a shorter extension in view of Respondents' concerns. *Second*, Respondents forfeited their right to seek dismissal based on Rule 4(a)(5)(C) because they failed to notice an appeal or a cross-appeal from the district court's order that extended the time to appeal. This Court has long recognized that a party that is requesting an appellate court to: (i) enlarge the party's own rights under a district court's order or judgment, or (ii) diminish the rights of its adversary under the order or judgment, must notice an appeal or a cross-appeal from that order or judgment. Respondents did not do so at all—let alone within the timeframe provided by the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107. Therefore, Respondents forfeited their right to seek dismissal under Rule 4(a)(5)(C). *Third*, Respondents forfeited their right to seek dismissal under Rule 4(a)(5)(C) because they failed to identify any untimeliness issue in their Joint Corrected Docketing Statement, and instead ***twice stated that Ms. Hamer's appeal was timely***. Respondents' two statements concerning the timeliness of Ms. Hamer's

appeal also constitute an affirmative waiver of their right to seek dismissal under Rule 4(a)(5)(C).

For these reasons, Respondents both forfeited and waived their right to seek dismissal under Rule 4(a)(5)(C). These forfeitures and waivers—alone or in combination—warrant a remand to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

Additionally, equitable considerations such as the unique-circumstances doctrine can excuse the filing of a notice of appeal outside the time provided by Rule 4(a)(5)(C). On at least three occasions, this Court has excused the late filing of a notice of appeal where the appellant was misled by the district court into believing that the notice of appeal would be timely. Although this Court overruled those cases to the extent that they authorized an exception to a jurisdictional rule, the unique-circumstances doctrine still applies to nonjurisdictional rules. The unique-circumstances doctrine is consistent with this Court's precedents and federal statutes. The doctrine is also consistent with the Federal Rules, which encourage disposition of cases on the merits and strongly discourage summary dismissal of cases based upon good-faith procedural violations that cause no prejudice to any party.

In this case, it is undisputed that Ms. Hamer filed her notice of appeal in reliance on the district court's order that extended the time to appeal beyond the time permitted by Rule 4(a)(5)(C). Accordingly, the unique-circumstances doctrine should excuse any noncompliance with Rule 4(a)(5)(C), and the case should be remanded to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

ARGUMENT

I. Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule Because It Does Not Derive from a Statute

As explained in detail below, 28 U.S.C. § 2107 does not impose the 30-day time limitation set forth in Rule 4(a)(5)(C).[5] Nor does any other statute provide this limitation. Accordingly, Rule 4(a)(5)(C) is not a jurisdictional rule.

A. Rule 4(a)(5)(C) Has No Statutory Basis

Two courts of appeals have recognized that "[a]lthough the authority to extend the time available to file an appeal is codified at 28 U.S.C. § 2107, Rule 4(a)(5)(C)'s thirty-day limit on the length of any extension ultimately granted appears nowhere in the U.S. Code." *Youkelsone v. Fed. Deposit Ins. Corp.*, 660 F.3d 473, 475 (D.C. Cir. 2011); *see also Abel v. Sullivan*, 326 F. App'x 431, 432 (9th Cir. 2009) (recognizing that "[Rule 4(a)(5)(C)]'s time limitation is not derived from statute"). These courts are correct. The statute provides that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the

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[5] Rule 4(a)(5)(C) sets a maximum extension of: (i) 30 days from the original time to appeal, or (ii) 14 days from the district court's entry of the order granting an extension of time, whichever is later. Because the district court's order extending the time to appeal was entered prior to the expiration of the original time to appeal (Pet. App. 60), the 30-day period applies here, and this brief therefore focuses on the 30-day period. The arguments in this brief, however, apply equally to the 14-day period, because that period—like the 30-day period—is nonstatutory.

time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." 28 U.S.C. § 2107(c). This provision sets no limit on the length of any extension, as long as the motion for an extension is timely filed.

As this Court has explained, "the starting point for [the analysis of a statute] is the statutory text." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003). Where the language is unambiguous, "the 'judicial inquiry is complete.'" *Id.* (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The plain language of § 2107(c) is clear: The statute does not limit the length of any extension of time that a district court can give to file a notice of appeal, so long as: (i) the motion for an extension of time is filed no later than 30 days after the expiration of the time otherwise set for bringing an appeal, and (ii) the moving party demonstrates excusable neglect or good cause.

The structure and history of § 2107(c) further confirm that the statute should be interpreted according to its plain language. Notably, the second part of § 2107(c) demonstrates that where Congress intends to limit the amount of extra time that a court may grant a party to file a notice of appeal, Congress does so explicitly. Specifically, if more than 30 days have elapsed since the time to file a notice of appeal has expired and a party has failed to move for an extension of time, the statute provides one additional opportunity for a party to obtain extra time to appeal. In particular, if a party has not received proper notice of the district court's appealable judgment, the party may, within 180 days of the entry of judgment or within 14 days after receipt of notice (whichever is

earlier), move the district court to reopen the time for appeal. 28 U.S.C. § 2107(c). If the district court grants the motion, it may "reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal." *Id.*

The fact that Congress included a maximum period for a district court to reopen the time to appeal in lack-of-notice cases in the second part of § 2107(c) but omitted any such maximum period from the first part further demonstrates that the first part of § 2107(c) contains no maximum extension of time.[6] *See Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 741-42 (2017) (using a companion provision of a statute to interpret the meaning of another portion of the same statute). Moreover, Congress has paid close attention to the time provisions in § 2107(c), and amends them when it sees fit. Specifically, in 2009, despite changing a time limitation set forth in the second part of § 2107(c), Congress left the first part of § 2107(c) unchanged. Statutory Time-Period Technical Amendments Act of 2009, Pub. L. No. 111-16, § 6, 123 Stat. 1607, 1608 (2009) (amending the second part of § 2107(c) to require the filing of a motion within 14 days of receipt of notice of the district court's judgment, rather than the former period of 7 days).[7]

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[6] All of § 2107(c) was enacted at the same time. Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991).

[7] Congress also amended 28 U.S.C. § 2107 in 2011 by making certain changes to § 2107(b). Appeal Time Clarification Act of 2011, Pub. L. No. 112-62, § 3, 125 Stat. 756, 757 (2011). This amendment, however, did not change § 2107(c). Since then, § 2107 has not been amended.

Finally, the fact that Congress expressly repealed such a limitation in 1991 bolsters the conclusion that § 2107(c) does not impose a maximum extension of time. Before 1991, § 2107 provided that "[t]he district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree." 28 U.S.C. § 2107, ¶ 4 (1988). In 1991, however, Congress: (i) repealed this language by "striking the third and fourth paragraphs [of § 2107]" and, as relevant here, (ii) amended the statute by adding 28 U.S.C. § 2107(c), which provides that "[t]he district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause." Pub. L. No. 102-198, § 12, 105 Stat. 1623, 1627 (1991). The House Report explains that the amendment to the statute includes "strik[ing] two paragraphs that are no longer applicable." H.R. Rep. No. 102-322, 1991 U.S.C.C.A.N. 1303, 1309 (1991). Since 1991, the first part of § 2107(c) has not changed. This history further demonstrates that § 2107(c) does not impose any limit on the length of any extension of time. "[W]hen Congress acts to amend a statute, [this Court] presume[s] it intends its amendment to have real and substantial effect." *Pierce Cty. v. Guillen*, 537 U.S. 129, 145 (2003) (quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)).

To determine whether a time limitation is jurisdictional, this Court "inquire[s] whether Congress has 'clearly state[d]' that the rule is jurisdictional; absent such a clear statement, . . . 'courts should treat

the restriction as nonjurisdictional in character.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). Here, not only has Congress failed to state that the time limitation set forth in Rule 4(a)(5)(C) is jurisdictional in nature, but, as explained above, Congress long ago affirmatively removed this time limitation from 28 U.S.C. § 2107. Moreover, the statute that delimits the jurisdiction of the Seventh Circuit does not impose the time limitation set forth in Rule 4(a)(5)(C). *See* 28 U.S.C. § 1291 (providing, in relevant part, that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States," but not setting any timeframe in which to do so). Nor does any other statute impose the time limitation set forth in Rule 4(a)(5)(C). Accordingly, Rule 4(a)(5)(C) falls within the general rule that "most time bars are nonjurisdictional[,]" and is a "filing deadline[]" that is a "'quintessential claim-processing rule[]'" that "'seek[s] to promote the orderly progress of litigation,' but do[es] not deprive a court of authority to hear a case." *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)).

In sum, Congress has not set any limitation on the length of extension that a district court can give—let alone a jurisdictional limitation.

B. Because Rule 4(a)(5)(C) Lacks a Statutory Basis, It Does Not Constitute a Limitation on a Court's Jurisdiction

Rule 4(a)(5)(C) is nonjurisdictional because it is not grounded in a statute. This Court has repeatedly clarified that nonstatutory deadlines that appear solely

in a court-promulgated rule cannot operate to deprive a court of jurisdiction. In *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court addressed whether a creditor's untimely objection to a debtor's discharge under the Federal Rules of Bankruptcy Procedure deprived a bankruptcy court of jurisdiction to adjudicate the creditor's objection. *Kontrick*, 540 U.S. at 446-47. The Court concluded that the late filing did not deprive the bankruptcy court of jurisdiction. *Id.* at 448-52. Important to the Court's analysis was the fact that "[n]o statute . . . specifies a time limit for filing a complaint objecting to the debtor's discharge." *Id.* at 448. In concluding that the nonstatutory time limit at issue was nonjurisdictional, the Court specified that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction." *Id.* at 452 (citing U.S. Const. art. III, § 1). The Court therefore recognized that "[c]ourt-prescribed rules of practice and procedure for cases in the federal district courts and courts of appeals . . . do not create or withdraw federal jurisdiction." *Id.* at 453 (citing *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978)) (internal quotation marks omitted); *accord* Fed. R. Civ. P. 82 (providing that "[the Federal Rules of Civil Procedure] do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts"); Fed. R. Bankr. P. 9030 (providing that "[the Federal Rules of Bankruptcy Procedure] shall not be construed to extend or limit the jurisdiction of the courts or the venue of any matters therein"). Congress permits courts to adopt rules of practice and procedure. *Kontrick*, 540 U.S. at 453; *see also* 28 U.S.C. § 2072(a) (providing that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district

courts . . . and courts of appeals"). However, such rules do not constitute a limitation on a court's jurisdiction. *Kontrick*, 540 U.S. at 453.

Since *Kontrick*, this Court has reaffirmed that nonstatutory deadlines are nonjurisdictional. In *Eberhart v. United States*, 546 U.S. 12 (2005), this Court summarily reversed the Seventh Circuit's conclusion that an untimely motion for a new trial under the Federal Rules of Criminal Procedure deprived the district court of jurisdiction over the motion. *Eberhart*, 546 U.S. at 16-20; *see also Bowles*, 551 U.S. at 210-11 (distinguishing between statutory and nonstatutory deadlines and confirming that nonstatutory court-promulgated rules are not jurisdictional); *Schacht v. United States*, 398 U.S. 58, 64 (1970) (providing that "[t]he procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional"); *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941) (noting "the inability of a court, by rule, to extend or restrict the jurisdiction conferred by a statute"); *In re Indu Craft, Inc.*, 749 F.3d 107, 114 (2d Cir. 2014) (concluding, based on this Court's precedents, that nonstatutory time limitations set forth in the Federal Rules of Appellate Procedure are nonjurisdictional in nature).

Contrary to the Seventh Circuit's conclusion that *Bowles* requires Rule 4(a)(5)(C) to be ranked as a jurisdictional requirement (Pet. App. 3-4), *Bowles* actually demonstrates that Rule 4(a)(5)(C) is nonjurisdictional. There, the appellant ("Bowles") missed his deadline to file a notice of appeal, and did not recognize the error until approximately sixty days after the expiration of the time to file a notice of

appeal. *See Bowles*, 551 U.S. at 207. Because he had not timely filed a motion to extend the time to appeal, Bowles was unable to avail himself of the provision in the first part of 28 U.S.C. § 2107(c), which allows a district court to extend the time for appeal "upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal." 28 U.S.C. § 2107(c). Instead, because no motion was filed within 30 days of the expiration of the time to bring an appeal, Bowles' only remedy lay in the second part of 28 U.S.C. § 2107(c), which permits the district court, under certain circumstances, to "reopen the time for appeal for a period of 14 days from the entry of the order reopening the time for appeal." 28 U.S.C. § 2107(c). Despite the clear statutory mandate that a district court may only reopen the time to appeal for a period of 14 days under those circumstances, the district court "inexplicably gave Bowles 17 days . . . to file his notice of appeal." *Bowles*, 551 U.S. at 207. Bowles filed his notice of appeal within the time set by the district court, "but after the 14-day period allowed by Rule 4(a)(6) and § 2107(c)." *Id.*

Although the Court in *Bowles* concluded that the Court of Appeals lacked jurisdiction over that appeal, critical to this Court's analysis was the fact that the 14-day time limit in Federal Rule of Appellate Procedure 4(a)(6) is also set forth in a statute. *See Bowles*, 551 U.S. at 210 (noting this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional" and "recogniz[ing] the jurisdictional significance of the fact that a time limitation is set forth in a statute"). In no way did the Court address Federal Rule of Appellate Procedure 4(a)(5)(C), which does not derive from a statute. Indeed, the Court

distinguished the case from *Kontrick* because the time limitation at issue in *Kontrick*—although set forth in the Federal Rules of Bankruptcy Procedure—did not implicate a court's jurisdiction because it did not appear in a statute. *Bowles*, 551 U.S. at 210-11. The Court recognized that "[o]nly Congress may determine a lower federal court's subject-matter jurisdiction[.]" *Id.* at 211 (quoting *Kontrick*, 540 U.S. at 452). Accordingly, the reasoning of *Bowles*—far from mandating a finding that Rule 4(a)(5)(C) is jurisdictional as the Seventh Circuit concluded—actually demonstrates that Rule 4(a)(5)(C) is nonjurisdictional.

Because nonstatutory deadlines do not implicate a court's jurisdiction, and because Rule 4(a)(5)(C) does not derive from a statute, this Court should adopt the reasoning of *Youkelsone* and *Abel* and conclude that Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule. *See Youkelsone*, 660 F.3d at 475-76 (concluding that Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, finding that the appellee forfeited the right to seek dismissal under Rule 4(a)(5)(C), and addressing the merits of the appeal); *Abel*, 326 F. App'x at 432 (concluding that Rule 4(a)(5)(C) is nonjurisdictional because it does not derive from a statute).

The nonjurisdictional nature of Rule 4(a)(5)(C) is further supported by the way that the courts of appeals, post-*Bowles*, have treated the deadlines to appeal in criminal cases. *See* Fed. R. App. P. 4(b)(1)(A) (setting a 14-day deadline for a criminal defendant to file a notice of appeal); Fed. R. App. P. 4(b)(4) (providing that "[u]pon a finding of excusable neglect or

good cause, the district court may . . . extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)"). These deadlines do not appear in a statute. For that reason, since *Bowles*, the courts of appeals have uniformly held that these deadlines are nonjurisdictional. *E.g., United States v. Reyes-Santiago*, 804 F.3d 453, 457-58 (1st Cir. 2015) (collecting cases and finding that the reasoning in *Bowles*, *Eberhart*, and *Kontrick* demonstrate that Rule 4(b) is nonjurisdictional because it is not set forth in a statute); *United States v. Watson*, 623 F.3d 542, 545-46 (8th Cir. 2010) (same); *United States v. Garduño*, 506 F.3d 1287, 1290-91 (10th Cir. 2007) (holding that Rules 4(b)(1)(A) and 4(b)(4) are nonjurisdictional rules). These decisions properly apply this Court's precedents. Because Rule 4(a)(5)(C)—like Rules 4(b)(1)(A) and 4(b)(4)—is not grounded in a statute, this Court should find that Rule 4(a)(5)(C) is a nonjurisdictional rule.

C. Because Rule 4(a)(5)(C) Is Not a Jurisdictional Rule and Because Ms. Hamer's Appeal Was Statutorily Timely, the Seventh Circuit Erred in Concluding that It Lacked Jurisdiction Over Ms. Hamer's Appeal

As explained above, Ms. Hamer filed a motion to extend the time to appeal well within the timeframe required by 28 U.S.C. § 2107(c). Because the district court entered judgment on September 14, 2015, Ms. Hamer's original time to appeal would have expired on October 14, 2015, and any motion to extend the time to appeal was required to be filed by November 13, 2015. Ms. Hamer filed her motion for an extension of time on

October 8, 2015—long before the November 13 deadline. Consequently, the filing of Ms. Hamer's notice of appeal—within the time set by the district court—was fully compliant with § 2107(c). Accordingly, because: (i) Ms. Hamer's appeal was statutorily timely, and (ii) Rule 4(a)(5)(C) is not a jurisdictional rule, the Seventh Circuit had jurisdiction over Ms. Hamer's appeal. This Court should reverse the Seventh Circuit's judgment that dismissed Ms. Hamer's appeal for lack of jurisdiction.

II. Because Federal Rule of Appellate Procedure 4(a)(5)(C) Is a Nonjurisdictional Claim-Processing Rule, an Appellee Can—as Respondents Did Here—Forfeit or Waive the Right to Seek Dismissal Under the Rule

Because Rule 4(a)(5)(C) is a nonjurisdictional claim-processing rule, it may be forfeited or waived by an appellee. Moreover, because Respondents both forfeited and waived their right to rely on Rule 4(a)(5)(C), this Court should instruct the Seventh Circuit to consider Ms. Hamer's appeal on the merits.

A. As a Nonjurisdictional Claim-Processing Rule, Rule 4(a)(5)(C) Is Subject to Forfeiture and Waiver by an Appellee

This Court has recognized that nonjurisdictional claim-processing rules are subject to forfeiture and waiver.[8] In *Kontrick*, the Court explained that unlike

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[8] This Court has explained that "[a]lthough jurists often use the words interchangeably, 'forfeiture is the failure to make the timely assertion of a right[,]'" whereas "waiver is the 'intentional

a jurisdictional rule, a nonjurisdictional claim-processing rule, "even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456. The Court then ruled that because the debtor waited too long to argue—under nonjurisdictional claim-processing rules found in Federal Rules of Bankruptcy Procedure—that a creditor's objection to the debtor's discharge was untimely, the untimeliness issue had been forfeited. *Id.* at 458-60. Similarly, the Court in *Eberhart* concluded that the Government had waited too long to argue that a criminal defendant's motion for a new trial was untimely under nonjurisdictional claim-processing rules found in the Federal Rules of Criminal Procedure, and therefore found that the Government forfeited the untimeliness issue. *Eberhart*, 546 U.S. at 19-20; *see also Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017) (recognizing that claim-processing rules are subject to forfeiture); *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (distinguishing jurisdictional rules from nonjurisdictional claim-processing rules on the ground that, among other things, subject-matter jurisdiction is not subject to waiver or forfeiture); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (recognizing that time-limitation periods are ordinarily "nonjurisdictional and thus subject to waiver and forfeiture") (internal quotation mark omitted). Rule 4(a)(5)(C) is therefore subject to forfeiture and waiver by an appellee. *Youkelsone*, 660 F.3d at 475-76

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relinquishment or abandonment of a known right.'" *Kontrick*, 540 U.S. at 458 n.13 (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

(addressing the merits of an appeal after finding that the appellee forfeited the right to seek dismissal under Rule 4(a)(5)(C)); *see also Mobley v. C.I.A.*, 806 F.3d 568, 578 (D.C. Cir. 2015) (noting that because it is a claim-processing rule, "[o]bjections based on FRAP 4(a)(5)(C) therefore can be forfeited or waived").

B. Respondents' Forfeiture and Waiver Here Preclude Them from Seeking Dismissal Under Rule 4(a)(5)(C)

1. Respondents Forfeited Their Right to Rely on Rule 4(a)(5)(C) by Failing to Raise Any Objection to the District Court

Respondents forfeited their right to seek dismissal under Rule 4(a)(5)(C) when they failed to inform the district court of any objection to the extension of time. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (recognizing that "[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below"). As this Court has noted in an analogous context, the limitation on an appellate court's authority to address evidentiary objections that were not raised to the district court at trial "serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them." *Puckett v. United States*, 556 U.S. 129, 134 (2009).

Here, had Respondents objected to the district court's extension of time, the district court could have considered whether to grant a shorter extension of time in view of Respondents' concerns. Because Respondents did not object, they forfeited their right to

seek dismissal of the appeal based upon any violation of Rule 4(a)(5)(C). A finding of forfeiture here is consistent with the overarching goal that the Federal Rules facilitate a disposition of claims on the merits. *See Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966) (recognizing that "[i]f rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits"); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (rejecting the notion that a defect in a notice of appeal was fatal to the appeal and concluding that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"); Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). A finding of forfeiture here would also incentivize putative appellees to bring any violation of Rule 4(a)(5)(C) to the district court's attention promptly.

Because Respondents did not argue to the district court that its extension was in violation of Rule 4(a)(5)(C), they forfeited their right to do so on appeal because they "wait[ed] too long to raise the point." *Kontrick*, 540 U.S. at 456.

2. Respondents Forfeited Their Right to Rely on Rule 4(a)(5)(C) by Failing to Notice an Appeal or a Cross-Appeal from the District Court's Extension of Time

This Court has recognized that "[t]o secure appellate review of a judgment or order, a party must file a notice of appeal from that judgment or order. Filing a notice of appeal transfers adjudicatory authority from the district court to the court of appeals." *Manrique*, 137 S. Ct. at 1271. As explained in detail below, a party seeking to challenge a district court's order extending the time to appeal must notice an appeal from that order. Because Respondents failed to notice an appeal at all from the district court's October 8, 2015 order granting Ms. Hamer an extension of time to appeal—let alone within the timeframe required under 28 U.S.C. § 2107 and the Federal Rules of Appellate Procedure—Respondents forfeited their right to seek dismissal of Ms. Hamer's appeal based upon any violation of Rule 4(a)(5)(C).

Although an appellee who does not take a cross-appeal is permitted to "urge in support of a [district court's] decree any matter appearing before the record," it is impermissible for "an appellee who does not cross-appeal [to] 'attack the [district court's] decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary.'" *Jennings v. Stephens*, 135 S. Ct. 793, 798 (2015) (quoting *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924)); *see also Greenlaw v. United States*, 554 U.S. 237, 240, 244-46 (2008) (holding that a court of appeals may not increase a criminal defendant's sentence in the

absence of an appeal or cross-appeal by the Government and noting that "it takes a cross-appeal to justify a remedy in favor of an appellee"); *El Paso Nat. Gas Co. v. Neztsosie*, 526 U.S. 473, 479-82 (1999) (concluding that a court of appeals may not reverse a preliminary injunction that has not been appealed by either party and recognizing that "in more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single [Supreme Court case] has ever recognized an exception to the rule").

At least two courts of appeals have concluded that, in order to seek review of a district court's order granting an extension of time to file a notice of appeal, a putative appellee must notice an appeal from the district court's order extending the time. *First*, in *Amatangelo v. Borough of Donora*, 212 F.3d 776 (3d Cir. 2000), the Third Circuit declined to disturb a district court's order granting an extension of time to appeal in a civil case "because the appellees did not appeal from the order granting the extension of time to appeal." *Amatangelo*, 212 F.3d at 780. *Second*, in *United States v. Burch*, 781 F.3d 342 (6th Cir. 2015), a post-*Jennings* case, the Sixth Circuit denied the Government's motion to dismiss a criminal defendant's appeal as untimely. The Sixth Circuit explained that the Government's motion to dismiss was "'attack[ing]' the district court's order [extending the time to appeal] as an abuse of discretion with a view to lessening Burch's rights—indeed his right to appeal at all." *Burch*, 781 F.3d at 344 (quoting *Jennings*, 135 S. Ct. at 798). Accordingly, the Sixth Circuit concluded that "[t]he government should have appealed from the district court's order if it thought the [district] court abused its discretion in granting Burch's motion for an

extension of time to file an appeal." *Burch*, 781 F.3d at 344. In so holding, the Sixth Circuit recognized that the Tenth Circuit came to the opposite conclusion in *United States v. Madrid*, 633 F.3d 1222 (10th Cir. 2011). *Burch*, 781 F.3d at 345. The Sixth Circuit, however, recognized that the Tenth Circuit's conclusion that no appeal or cross-appeal was required rested on a "misread[ing] [of] Supreme Court precedent in determining when an appellee must file an appeal or cross-appeal[]" and was inconsistent with *Jennings*, which "makes clear that a cross-appeal is required when an appellee attacks an order with a view toward 'enlarging his own rights thereunder *or* of lessening the rights of his adversary." *Burch*, 781 F.3d at 345 (quoting *Jennings*, 135 S. Ct. at 798).

Here, any attempt by Respondents to have Ms. Hamer's appeal dismissed based on Rule 4(a)(5)(C) would necessarily seek to lessen Ms. Hamer's rights. Because the district court granted Ms. Hamer an extension of time until December 14, 2015 to file her notice of appeal, dismissal under Rule 4(a)(5)(C) would require: (i) a conclusion that Ms. Hamer was not entitled to the requested extension of time, and (ii) a reversal of the district court's order. Such a reversal would clearly constitute a lessening of Ms. Hamer's rights. Additionally, any attempt by Respondents to seek dismissal under Rule 4(a)(5)(C) would constitute an attempt to enlarge Respondents' own rights. Such an attempt would not be an argument for affirmance of the district court's judgment, but instead would be an argument that the district court's judgment is not subject to appellate review at all. Because dismissal based on Rule 4(a)(5)(C) would both enlarge Respondents' rights and lessen Ms. Hamer's rights,

Respondents were required to notice either an appeal or a cross-appeal from the district court's extension of time in order to seek dismissal based on that Rule. *Jennings*, 135 S. Ct. at 798; *Burch*, 781 F.3d at 345. Because Respondents did not do so, they forfeited their right to seek dismissal under Rule 4(a)(5)(C).

In the case of an appeal, a notice of appeal must be filed "within 30 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(A); *see also* 28 U.S.C. § 2107(a) (providing that a notice of appeal must be filed "within thirty days after the entry of such judgment, order or decree"). Accordingly, if Respondents wanted to appeal (as opposed to cross-appeal) the district court's extension of time, Respondents were required to file a notice of appeal from the district court's order by November 9, 2015. Fed. R. App. P. 4(a)(1)(A)[9]; *see also* 28 U.S.C. § 2107(a). Respondents did not file a notice of appeal from the district court's order, and instead waited until January 8, 2016 to argue that Ms. Hamer's appeal should be dismissed for noncompliance with Rule 4(a)(5)(C). Pet. App. 68-86.

In the case of a cross-appeal, the Federal Rules of Appellate Procedure provide that "[i]f one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later." Fed. R. App. P. 4(a)(3). Accordingly, because

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[9] The deadline to file a notice of appeal was November 9, 2015 because November 8, 2015 fell on a Sunday. Fed. R. App. P. 26(a)(1)(C).

Ms. Hamer filed her notice of appeal on December 11, 2015—within the period set by the district court and therefore timely under § 2107(c)—Respondents were required to file any notice of cross-appeal no later than December 28, 2015.[10] Respondents did not file a notice of appeal from the district court's order at all, and instead waited until January 8, 2016 to argue that Ms. Hamer's appeal should be dismissed for noncompliance with Rule 4(a)(5)(C). Pet. App. 68-86.

In sum, Respondents did not notice an appeal or a cross-appeal from the district court's October 8, 2015 order at all—and assuredly not within the timeframe provided by the Federal Rules of Appellate Procedure and 28 U.S.C. § 2107. Instead, Respondents sought dismissal of the appeal only through briefing filed with the Seventh Circuit well after the expiration of the time to notice an appeal from the district court's order. Respondents therefore forfeited their right to seek dismissal of the appeal based on any noncompliance with Rule 4(a)(5)(C) because they "wait[ed] too long to raise the point." *Kontrick*, 540 U.S. at 456.

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[10] December 25, 2015—14 days after Ms. Hamer's notice of appeal—was a federal holiday, and December 26-27 fell on the weekend. Therefore, any notice of cross-appeal was due by December 28, 2015. Fed. R. App. P. 26(a)(1)(C).

3. By Affirmatively Stating to the Seventh Circuit that Ms. Hamer's Appeal Was Timely, Respondents Waived and Forfeited Their Right to Seek Dismissal Based on Rule 4(a)(5)(C)

As discussed above, Respondents stated to the Seventh Circuit, in their Joint Corrected Docketing Statement, that "on December 11, 2015, [Ms. Hamer] filed a timely Notice of Appeal" (Pet. App. 63), and then reiterated on the next page that "[Ms. Hamer] timely filed a Notice of Appeal[]" (Pet. App. 64). Through these clear statements, Respondents committed both waiver and forfeiture.

First, Respondents' statements demonstrated unequivocally that they would not seek to challenge the timeliness of Ms. Hamer's appeal. Therefore, these statements constitute a waiver of Respondents' right to seek dismissal under Rule 4(a)(5)(C). Indeed, Respondents' Joint Corrected Docketing Statement specifically articulated: (i) the date on which the district court entered final judgment against Ms. Hamer, (ii) the date on which Ms. Hamer filed a motion to extend the deadline to appeal, (iii) the date on which the district court granted Ms. Hamer's motion to extend the deadline to appeal, (iv) the new deadline that the district court set for Ms. Hamer to file a notice of appeal, and (v) the date on which Ms. Hamer filed a notice of appeal. Pet. App. 63-64. Yet Respondents twice stated that Ms. Hamer's appeal was timely. Pet. App. 63-64. Accordingly, Respondents waived their right to seek dismissal of Ms. Hamer's appeal under Rule 4(a)(5)(C).

Second, Respondents' statements that the appeal was timely also constitute a forfeiture of their right to seek dismissal under Rule 4(a)(5)(C) because these statements demonstrate that Respondents did not promptly raise the issue with the Seventh Circuit. To the contrary, Respondents sought dismissal based on Rule 4(a)(5)(C) only after the Seventh Circuit inquired about the appeal's timeliness. Pet. App. 66-86. Respondents had ample opportunity to raise the timeliness issue in their Joint Corrected Docketing Statement, but did not do so until later. Respondents' failure to argue, in the Joint Corrected Docketing Statement, that the appeal was untimely further demonstrates that Respondents forfeited the right to seek dismissal of the appeal based on any violation of Rule 4(a)(5)(C).

III. As a Nonjurisdictional Claim-Processing Rule, Federal Rule of Appellate Procedure 4(a)(5)(C) Is Subject to Equitable Considerations Such as the Unique-Circumstances Doctrine

As one commentator noted, this Court recognizes the unique-circumstances doctrine as "an equitable basis upon which to reach the merits of an appeal" that, although untimely, should "be treated as timely because the appellant reasonably relied upon a district court's representation that the appeal period would be lengthier than it turned out to be." Philip A. Pucillo, *Timeliness, Equity, and Federal Appellate Jurisdiction: Reclaiming the "Unique Circumstances" Doctrine*, 82 Tul. L. Rev. 693, 701 (2007). As explained below, recognition of the unique-circumstances doctrine to excuse a violation of Rule 4(a)(5)(C) is fully consistent

with: (i) this Court's case law, (ii) federal statutes, and (iii) the Federal Rules. This doctrine is squarely applicable to the facts of this case and excuses the timing of Ms. Hamer's notice of appeal. Accordingly, this Court should remand the case to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

A. Equitable Considerations Such as the Unique-Circumstances Doctrine Can Excuse Noncompliance with Rule 4(a)(5)(C)

1. This Court's Precedents Demonstrate that Equitable Considerations Can Excuse a Party Who Files a Belated Notice of Appeal in Reliance on a District Court's Order

This Court has recognized that a party should not be penalized for relying on a district court's erroneous extension of time to file a notice of appeal. The Court first recognized this in 1962, in the context of reviewing the Seventh Circuit's dismissal of an appeal. As they existed at that time, the Federal Rules and a federal statute permitted an extension of time to appeal only if a party: (i) had not received notice of the district court's judgment, and (ii) demonstrated excusable neglect.[11] *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 303 F.2d 609, 611 (7th Cir. 1962). Nevertheless, upon motion filed before the expiration of the original time to appeal, the district court granted

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[11] As discussed in detail above, these provisions have since been amended.

an extension of time to appeal because the plaintiff's co-counsel had gone on vacation, even though the plaintiff's attorney of record had already received notice of the district court's adverse judgment. *Id.* at 610-11. In reliance on the district court's extension of time, the plaintiff filed its notice of appeal outside the initial 30-day period to appeal but within the time set by the district court. *Id.* The Seventh Circuit, however, concluded that because the plaintiff had received notice of the district court's judgment, the district court was not authorized to extend the time to appeal. *Id.* at 611-12. The Seventh Circuit therefore dismissed the appeal. *Id.* at 612. This Court reversed. *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) ("*Harris Truck Lines II*"). In reversing, this Court recognized "the obvious great hardship to a party who relies upon the trial judge's finding of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding," admonished the courts of appeals to "give[] great deference" to a district court's extension of time to appeal, and concluded that "the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the [district court's] ruling." *Harris Truck Lines II*, 371 U.S. at 217.

In *Thompson v. Immigration & Naturalization Service*, 375 U.S. 384 (1964), this Court extended the reasoning set forth in *Harris Truck Lines II*. In *Thompson*, although the party's motion for a new trial was belatedly filed, the district court assured him that the motion was filed "in ample time." *Thompson*, 375 U.S. at 386. The party filed a notice of appeal within 60 days of the district court's disposition of the motion

for a new trial, but not within 60 days of the original judgment. *Id.* at 384-86. Had the motion actually been filed "in ample time," the time to file a notice of appeal would not have begun to run until the district court disposed of the motion. *Id.* at 385-86. However, because the motion was untimely, the filing of the motion did not toll the time to appeal. *Id.* The Seventh Circuit therefore dismissed the appeal as untimely. *Id.* at 387. This Court reversed in view of the "unique circumstances" and directed the Seventh Circuit to consider the appeal on the merits. *Id.*; *see also Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989) (explaining that *Thompson* excuses a tardy notice of appeal "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that [the] act has been properly done"); *Wolfsohn v. Hankin*, 376 U.S. 203, 203 (1964) (summarily reversing the dismissal of an appeal, based upon the reasoning in *Harris Truck Lines II* and *Thompson*).

Although this Court in *Bowles* overruled *Harris Truck Lines II* and *Thompson* "to the extent they purport to authorize an exception to a jurisdictional rule," *Bowles* did not overrule these cases as applied to nonjurisdictional rules. *Bowles*, 551 U.S. at 214; *see also Mobley*, 806 F.3d at 577 (citations omitted). Indeed, the D.C. Circuit recently applied the unique-circumstances doctrine to excuse the filing of an untimely post-judgment motion. *Mobley*, 806 F.3d at 577-78. In particular, it concluded that the appellant's untimely motion under Federal Rule of Civil Procedure 59(e) was caused by the district court's erroneous assurances regarding the deadline for that motion. *Id.*

Accordingly, the D.C. Circuit applied the unique-circumstances doctrine to conclude that the Rule 59(e) motion was to be deemed timely, and that the motion therefore tolled the time to file a notice of appeal. *Id.*; *see also Khan v. U.S. Dep't of Justice*, 494 F.3d 255, 258-60 (2d Cir. 2007) (concluding that *Bowles* did not alter the ability of a court to recognize equitable exceptions to nonjurisdictional deadlines for filing an appeal); 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950.1 (4th ed. 2017) (noting that the unique-circumstances doctrine may be used to excuse noncompliance with nonjurisdictional rules). Application of the unique-circumstances doctrine to nonjurisdictional deadlines is fully consistent with this Court's precedents. *See Carlisle v. United States*, 517 U.S. 416, 436 (1996) (Ginsburg, J., concurring) (quoting 4A Wright & Miller, *Federal Practice & Procedure* § 1168, at 501) (noting that this Court's decisions in *Thompson* and *Harris Truck Lines II* are "based on a theory similar to estoppel").

The reasoning of *Harris Truck Lines II* directly applies to Rule 4(a)(5)(C). *Harris Truck Lines II* involved former Federal Rule of Civil Procedure 73(a), which provided that "upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment the district court in any action may extend the time for appeal not exceeding 30 days from the expiration of the original time herein prescribed." 12 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3062 (2d ed.

2017) (quoting Fed. R. Civ. P. 73(a) (1949)).[12] Although former Federal Rule of Civil Procedure 73(a) stated that an extension of time was only available where the party has not learned of entry of the judgment, *Harris Truck Lines II* recognized that a party that has relied, in good faith, on a district court's erroneous extension of time should not be penalized by suffering a dismissal of the appeal. Similarly here, although Rule 4(a)(5)(C) sets forth a maximum length of time for an extension, there is no reason to penalize a party that has relied in good faith on a district court's extension of time beyond that set by the Rule.

This Court's decision in *Schacht* is also instructive. In that criminal case, the petitioner filed a petition for a writ of certiorari outside the time period permitted by the Rules of this Court, and the Government argued that the Court could not consider the merits of the petition because the time period in the Rules cannot be waived. *Schacht*, 398 U.S. at 63. Rejecting the Government's view, this Court explained that the time period to file a petition for a writ of certiorari in a

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[12] Former Federal Rule of Civil Procedure 73 is closely related to Federal Rule of Appellate Procedure 4. Specifically, when the Federal Rules of Appellate Procedure went into effect in 1968, original Rule 4(a) adopted the timing provisions that then existed in Federal Rule of Civil Procedure 73. 16A Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3950 (4th ed. 2017). In 1979, Rule 4(a) was amended to permit an extension of time to appeal upon a showing of excusable neglect or good cause, with the maximum extension being the later of: (i) 30 days from the original deadline to appeal, or (ii) 10 days from the order granting the extension. *Id.* The 1979 amendment tracks what is currently Rule 4(a)(5)(C), except that in 2009, the 10-day period was changed to a 14-day period. *Id.*

criminal case is not a jurisdictional rule, and that the Rule "contains no language that calls for so harsh an interpretation." *Id.* at 63-64. Rather, the Court explained that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require." *Id.* at 64.

In addition to being consistent with this Court's case law, recognition of equitable exceptions to Rule 4(a)(5)(C) is good policy. District courts are not likely to extend the time beyond what is allowed by Rule 4(a)(5)(C) very often. And it is likely to be even more infrequent that a district court grants such an extension without objection from the opposing parties. When the district court does grant such an extension in the absence of an objection from the opposing parties, it would be unjust to adopt a rule that automatically requires dismissal of the appeal.

This Court's precedents demonstrate that the Federal Rules should be construed to favor an adjudication of claims on the merits. This Court has noted that the Rules should generally not be construed to require "summary dismissals," and instead should "not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Surowitz*, 383 U.S. at 373; *see also Foman*, 371 U.S. at 181 (1962) (rejecting the notion that a defect in a notice of appeal was fatal to the appeal and concluding that "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities"); Fed. R. Civ. P. 1 (providing that the Federal Rules of Civil Procedure "should be construed, administered,

and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding"). Based on this Court's precedents, Rule 4(a)(5)(C) should be construed to be subject to equitable considerations.

2. Recognition of Equitable Considerations with Respect to Rule 4(a)(5)(C) Is Consistent with This Court's Treatment of Nonjurisdictional Deadlines and 28 U.S.C. § 2107(c)

a. Recognition of Equitable Exceptions Is Consistent with This Court's Treatment of Nonjurisdictional Statutory Deadlines

Recognition of equitable exceptions is also consistent with this Court's treatment of nonjurisdictional statutory deadlines. This Court has long held that "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 560 U.S. at 645-46 (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). This Court has also recognized that "[i]t is hornbook law that limitations periods are customarily subject to equitable tolling . . . unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotation marks omitted).

Rule 4(a)(5)(C) should be subject to equitable considerations for the same reasons that federal statutes of limitations are generally subject to such

considerations. "[T]he basic policies of all limitation provisions" are "repose, elimination of stale claims, and certainty about a plaintiff's opportunity for recovery and a defendant's potential liabilities." *Rotella v. Wood*, 528 U.S. 549, 550 (2000). As this Court once explained, tolling was applicable to a time limitation where "[r]espondent could not have relied upon the policy of repose embodied in the limitation statute, for it was aware that petitioner was actively pursuing his FELA remedy." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 429-30 (1965); *see also Bowles*, 551 U.S. at 216 (Souter, J., dissenting) (recognizing that nonjurisdictional time limitations "may be waived or mitigated in exercising reasonable equitable discretion[]"); *Carlisle*, 517 U.S. at 435 (Ginsburg, J., concurring) (recognizing, in the context of the Federal Rules of Criminal Procedure, that such rules should be treated like "[t]ime requirements in lawsuits," which "are customarily subject to 'equitable tolling'") (alteration in original) (citation omitted).

Because Rule 4(a)(5)(C) imposes a maximum extension of time that a district court may grant, equitable considerations will only arise where a district court has granted an extension of time beyond what is permitted by the Rule. In such a case, a putative appellee will not be relying on any policy of "repose, elimination of stale claims, [or] certainty about a plaintiff's opportunity for recovery [or] a defendant's potential liabilities" (*Rotella*, 528 U.S. at 550) because the appellee will be on notice that the time to appeal has been extended. Therefore, the appellee will not be surprised when a notice of appeal is filed within the time set by the district court.

b. Recognition of Equitable Considerations Is Consistent with 28 U.S.C. § 2107(c)

Recognition of equitable exceptions to Rule 4(a)(5)(C) is also consistent with the text of 28 U.S.C. § 2107(c), which allows extensions of time upon a showing of "excusable neglect or good cause." 28 U.S.C. § 2107(c); *see also* Fed. R. App. P. 4(a)(5)(A)(ii). "Excusable neglect" and "good cause" are both equitable concepts. As one commentator has noted, "Congress has . . . seen fit to empower judicial discretion in consideration of the equities in the deadline to file a civil notice of appeal" by way of 28 U.S.C. § 2107(c). Scott Dodson, *Jurisdiction and Its Effects*, 105 Geo. L.J. 619, 637 n.109 (2017). Additionally, this Court, in determining what constitutes "excusable neglect" under the Federal Rules of Bankruptcy Procedure, explained that "the determination [of excusable neglect] is at bottom an equitable one." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993); *see also Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958, 966 (D.C. Cir. 2016) (noting, in the context of Federal Rule of Civil Procedure 55(c), that "[t]he 'good cause' standard is designed to empower courts to consider the equities that specially arise in a given case"). Because Congress passed a statute allowing for extension of time to appeal that: (i) sets no maximum length for any extension of time, and (ii) specifically requires an analysis of equitable considerations, it would be incongruous—and inconsistent with the equitable nature of § 2107(c)—to interpret the time limitation in Rule 4(a)(5)(C) as insusceptible to equitable considerations.

3. Other Federal Rules and at Least One Other Federal Statute Confirm that the Unique-Circumstances Doctrine Can Excuse Noncompliance with Rule 4(a)(5)(C)

Recognizing equitable considerations with respect to Rule 4(a)(5)(C) is also consistent with the Federal Rules and federal law in general. When a Rule is to be interpreted as mandating an automatic disposition of a claim or defense without regard to the circumstances, it says so explicitly. *See* Fed. R. Civ. P. 12(h)(3) (providing that "[if] the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the action) (emphasis added); Fed. R. Civ. P. 55(b)(1) (providing, under certain circumstances, that the clerk "must enter judgment" against a defaulting party); *see also* Fed. R. Civ. P. 12(h)(1) (providing that certain defenses are deemed waived if not presented within the prescribed timeframe). Rule 4(a)(5)(C) gives no indication that a district court's extension of time beyond the time period allowed by the Rule should result in automatic dismissal of the appeal, and therefore should not be so interpreted. *See Schacht*, 398 U.S. at 64 (noting that this Court's procedural rules "can be relaxed by the Court in the exercise of its discretion when the ends of justice so require"); *see also State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436, 442-43 (2016) (concluding that the violation of a court's seal order under the False Claims Act does not automatically require dismissal of a case, in part because other provisions of the False Claims Act "do require, in express terms, the dismissal of a relator's action").

Recognition of equitable considerations with respect to Rule 4(a)(5)(C) is also consistent with other provisions that make clear that a district court's order should not be upset in the absence of harm to the parties. For example, 28 U.S.C. § 2111 provides that "[o]n the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record *without regard to errors or defects which do not affect the substantial rights of the parties*." 28 U.S.C. § 2111 (emphasis added). Similarly, Federal Rule of Civil Procedure 61 provides that "[u]nless justice requires otherwise, no error . . . by the court or a party—is ground for . . . vacating, modifying, or otherwise disturbing a judgment or order." Fed. R. Civ. P. 61. By the plain terms of Rule 4(a)(5)(C), a violation of the Rule can only occur when a district court extends the time to appeal beyond the time provided therein. Dismissal of an appeal that is filed: (i) within the time set by the district court, but (ii) outside the period permitted by Rule 4(a)(5)(C), would necessarily require a court of appeals to disturb the district court's extension of time. Where an appellant has relied in good faith on a district court's extension of time and there has been no prejudice to the appellee, it would run afoul of § 2111 and Rule 61 to require automatic dismissal of an appeal that is timely under § 2107 and the district court's order, but untimely under Rule 4(a)(5)(C). This further demonstrates that Rule 4(a)(5)(C) should be interpreted to permit equitable considerations.

Finally, recognition of equitable considerations with respect to Rule 4(a)(5)(C) is consistent with the fact that even willful violations of the Rules do not automatically lead to dismissal of a case. For example,

when a party files a frivolous paper with a district court or files a paper for an improper purpose, the party is subject to sanctions that "must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(4). Additionally, a party who fails to obey a discovery order is subject to sanctions, but such sanctions do not automatically include dismissal of the case. Fed. R. Civ. P. 37(b)(2)(A); *see also Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 640 (1976) (quoting *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958)) (noting that dispositive sanctions should not be imposed where the violation was "due to inability, and not to willfulness, bad faith, or any fault of petitioner"). Since even willful violations of the Rules do not mandate automatic dismissal, certainly an unintentional violation of Rule 4(a)(5)(C)—such as the one that occurred here—must be subject to equitable considerations.

In sum, the structure of the Federal Rules, as well as a statutory mandate that a district court's erroneous order should not be disturbed where there is no prejudice to the parties, support a construction of Rule 4(a)(5)(C) that gives courts recourse to equitable considerations.

B. The Unique-Circumstances Doctrine Precludes Dismissal of the Appeal Here

In view of the undisputed facts of this case, the unique-circumstances doctrine should excuse the timing of Ms. Hamer's notice of appeal. On October 8, 2015, Ms. Hamer's court-appointed counsel—in the

context of seeking to withdraw from the representation of Ms. Hamer—filed a motion to extend the time to appeal until December 14, 2015. Pet. App. 57-59. The district court then issued an order: (i) granting the motion to withdraw, and (ii) granting Ms. Hamer—who was rendered a *pro se* litigant by operation of the district court's order granting the motion to withdraw—an extension of time until December 14, 2015 to file a notice of appeal. Pet. App. 60. As the Seventh Circuit recognized (Pet. App. 4) and as Respondents have acknowledged (Opp. 4; [13] Pet. App. 69; Pet. App. 71), Ms. Hamer filed her notice of appeal on December 11, 2015 in reliance on the district court's order. Pet. App. 2; Pet. App. 4 (stating that "[the Seventh Circuit] recognize[s] that Ms. Hamer relied upon the district court's erroneous Order and was misled into believing that she had until December 14, 2015 to file her Notice of Appeal"); Opp. 4 (noting Ms. Hamer's "apparent reliance" on the district court's order extending the time to appeal); Pet. App. 69 (same); Pet. App. 71 (same).

This situation is nearly identical to the facts of *Harris Truck Lines II*, discussed in detail above. Like the appellant in *Harris Truck Lines II*, Ms. Hamer diligently moved for an extension of time before the original deadline for filing a notice of appeal, and the district court granted the requested extension. Pet. App. 57-60. Because it is undisputed that Ms. Hamer relied on this order in filing her notice of appeal, the unique-circumstances doctrine excuses any noncompliance with the timing requirements set forth

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[13] "Opp." refers to the Brief for Respondents in Opposition.

in Rule 4(a)(5)(C). Moreover, the facts of this case fit the extension of the unique-circumstances doctrine set forth in *Thompson* and articulated by the Court in *Osterneck*. As the Court in *Osterneck* explained, the reasoning in *Thompson* applies "where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that [the] act has been properly done." *Osterneck*, 489 U.S. at 179. Here, within the timeframe set by 28 U.S.C. § 2107(c) and Federal Rule of Appellate Procedure 4(a)(5)(A), Ms. Hamer filed a motion for an extension of time to appeal, and was specifically assured by the district court that a notice of appeal would be timely if filed by December 14, 2015. Pet. App. 57-60. Accordingly, because Ms. Hamer appealed within the timeframe set by the district court, the timing of Ms. Hamer's notice of appeal not only fits within the unique-circumstances doctrine as set forth in *Harris Truck Lines II*, but also fits within the doctrine as expressed in *Osterneck* and *Thompson*.

CONCLUSION

The judgment of the Seventh Circuit should be reversed, and the case should be remanded to the Seventh Circuit for consideration of Ms. Hamer's appeal on the merits.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

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PL 112-62, November 29, 2011, 125 Stat 756 . . . 18a

28 U.S.C. § 2107 (1988)
Time for appeal to court of appeals

Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

(June 25, 1948, ch. 646, 62 Stat. 963; May 24, 1949, ch. 139, §§ 107, 108, 63 Stat. 104; Nov. 6, 1978, Pub. L. 95–598, title II, § 248, 92 Stat. 2672.)

PL 102–198, December 9, 1991, 105 Stat 1623

UNITED STATES PUBLIC LAWS
102nd Congress - First Session
Convening January 3, 1991

Additions and Deletions are not identified in this document.
8848

PL 102–198 (S 1284)
December 9, 1991
JUDICIAL IMPROVEMENTS

An Act to make certain technical corrections in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

<< 28 USCA § 2107 >>

SEC. 12. CONFORMITY WITH RULES OF APPELLATE PROCEDURE.

Section 2107 of title 28, United States Code, is amended—

(1) by designating the first and second paragraphs as subsections (a) and (b), respectively;
(2) by striking the third and fourth paragraphs;
(3) by designating the fifth paragraph as subsection (d); and
(4) by inserting after subsection (b), as so designated, the following:

"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

"(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

"(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.".

Approved December 9, 1991

PL 102–198, 1991 S 1284

H.R. REP. 102-322, H.R. Rep. No. 322, 102ND Cong., 1ST Sess. 1991, 1991 WL 251360, 1991 U.S.C.C.A.N. 1303 (Leg.Hist.)

****1303 P.L. 102-198, JUDICIAL IMPROVEMENTS**

***1 TECHNICAL AMENDMENTS TO LAWS RELATING TO THE COURTS**
DATES OF CONSIDERATION AND PASSAGE
Senate: June 12, November 22, 1991
House: November 19, 1991
House Report (Judiciary Committee) No. 102-322,
Nov. 18, 1991 (To accompany S 1274)
Cong. Record Vol. 137 (1991)

HOUSE REPORT NO. 102–322

November 18, 1991
[To accompany S. 1284]

The Committee on the Judiciary, to whom was referred the Act (S. 1284) to make certain technical corrections in the Judicial Improvements Act of 1990, having considered the same, report favorably thereon with amendments and recommend that the Act as amended do pass.

****0** The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

* * *

*4 SEC. 12. CONFORMITY WITH RULES OF APPELLATE PROCEDURE.

Section 2107 of title 28, United States Code, is amended–

(1) by designating the first and second paragraphs as subsections (a) and (b), respectively;

(2) by striking the third and fourth paragraphs;

(3) by designating the fifth paragraph as subsection (d); and

(4) by inserting after subsection (b), as so designated, the following:

"(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds–

"(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

"(2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.".

Amend the title so as to read: "An Act to make certain technical corrections in the Judicial

Improvements Act of 1990 and other provisions of law relating to the courts".

EXPLANATION OF AMENDMENT

Inasmuch as S. 1284 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

PURPOSE OF THE LEGISLATION

The purpose of the bill, as amended, is to provide technical amendments to recently enacted court reform proposals–most notably the Judicial Improvements Act of 1990–and the Federal Rules of Civil and Appellate Procedure submitted to the Congress on May 1, 1991, by the Supreme Court of the United States.

HEARINGS

The Subcommittee on Intellectual Property and Judicial Administration, to which the bill was referred, held no hearings on the proposed legislation. During previous Congresses, numerous days of hearings were conducted on the underlying, substantive legislation.

**1304 COMMITTEE VOTE

On October 29, 1991, a reporting quorum being present, the Committee on the Judiciary ordered S. 1284 reported to the full House by voice vote, as amended.

DISCUSSION

I. LEGISLATIVE HISTORY

On June 12, 1991, S. 1284 was introduced by Senator Symms on behalf of Senators Heflin and Thurmond. The bill was immediately sent to the Senate desk and passed by unanimous consent. At the time of its Senate passage, the bill consisted of six titles.

On October 1, 1991, the Subcommittee on Intellectual Property and Judicial Administration considered S. 1284 and reported the bill favorably to the full Committee as an amendment in the nature of a substitute by voice vote, a quorum of Members being *5 present. The six titles of the Senate-passed bill were, in large part, approved. The Subcommittee added five further sections and modified the title of the bill.

On October 29, 1991, the full Committee marked up S. 1284 and, a quorum of Members being present, approved the amendment in the nature of a substitute and favorably reported the bill by voice vote, no objections being heard.

II. BACKGROUND

The background of this technical amendments legislation can best be discussed under three subject hearings: (1) The Judicial Improvements Act of 1990; (2) the Federal Rules of Civil and Appellate Procedure; and (3) recently enacted court reform legislation. Technical amendments are made in these three areas.

A. The Judicial Improvements Act of 1991[1] was a significant piece of court reform legislation. Passed by the 101st Congress and signed by President Bush on December 1, 1990, the multi-titled Act accomplished court reforms in four distinct areas; civil justice expense and delay reduction plans; creation of Federal judgeships; implementation of recommendations of the Federal Courts Study Committee; and judicial discipline and removal improvements.

Sections 1 through 9 of the proposed legislation provide technical amendments to the Judicial Improvements Act of 1990.

B. At its September 1990 session, the Judicial Conference of the United States voted to transmit to the Supreme Court certain changes to the Federal Rules of Civil Procedure, including modifications to Rule 4 relating to service of a summons. As explained in the letter of transmittal by the Chief Justice to the Congress, the Court decided not to proceed with the Rule 4 amendments as well as certain other amendments without further consideration by the Court.[2] In the process of deleting Rule 4 and related amendments from the package of Civil Rules amendments, the Court failed to properly draft the new package. Three mistakes were made. A technical amendment proposed to Rule 15(c)(3) was overlooked. In addition, as explained by the Director of

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[1] Pub. L. No. 101–650, 104 Stat. 5089 (Dec. 1, 1991).

[2] Amendments to the Federal Rules of Civil Procedure, Communication from the Chief Justice of the United States, 102d Cong., 1st Sess. (1991).

Administrative Office of the U.S. Courts, "*** two new forms I–A and I–B, to accompany **1305 the proposed changes to Rule 4 and to replace Form 19–A, were inadvertently transmitted by the Court."[3]

Section 11 of the proposed legsislation cures these errors.

Moreover, a fourth technical error arises from the proposed amendments to the Federal Rules of Appellate Procedure.[4] The amendments to Rule 4(a)(5), which relates to authorization for extension of time to file notices of appeal, create a conflict with the current statutory provisions found in section 2107 of title 28, United States Code. If the rule change take effect, without modifications to the statutory text, questions may arise about which of the different provisions is controlling. The result will breed mindless litigation. As aptly observed by the Chairman of the Standing *6 Committee on Rules of Practice and Procedure, the Honorable Robert E. Keeton, "doubts about the consistency of meaning of the statute and the rule could lead to wastefully expensive litigation and inadvertent loss of rights of appeal in a procedural snarl.***"[5] In the view of the Committee, this snarl can be avoided with the curative legislation found in section 12 of S. 1284, as amended.

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[3] See appendix 1.

[4] Amendments to the Federal Rules of Evidence, Communication from the Chief Justice of the United States, 102d Cong., 1st Sess. (1991).

[5] Letter to Hon. William J. Hughes from Hon. Robert E. Keeton (dated October 16, 1991).

The Committee is mindful of the fact that the various Rules Enabling Acts permit rules to supersede inconsistent procedural statutes previously enacted by the Congress. In 1988 the House of Representatives passed legislation proposed by this Committee to eliminate the supersession clauses, finding them to be unnecessary and of dubious constitutionality.[6] The Senate would not accept the proposal but a nonstatutory agreement was brokered by Chief Justice Rehnquist that allowed other needed reforms to be enacted into law.[7]

In a letter to the Honorable Peter W. Rodino, Jr., the Chief Justice reiterated that the judiciary did not object to repeal of the supersession clauses. However, if they remained in the statute books, the Chief Justice suggested that the judicial branch would not supersede statutes without giving Congress every opportunity to examine the proposals. Chief Justice Rehnquist observed:

> The Judicial Conference and its committees on rule have participated in the rules promulgation process for over a half century. During this time they have always been keenly aware of the special responsibility they have in the rules process and the duty incumbent upon them not to overreach their charter. The advisory committees should undertake to be circumspect in superseding procedural statutes.

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[6] See H. Rept. No. 100–889 (Part 1), 100th Cong., 2d Sess. (1988).

[7] See Pub. L. No. 101–650, 101st Cong., 2d Sess. (1990), 104 Stat. 5089.

> At the very least, we will undertake to identify such situations when they arise so that the Congress will have every opportunity to examine these instances on the merits as part of your review. This is generally the approach we have undertaken in the past and I assure you that it will continue to be the standard operating procedure **1306 of the Standing Committee on Rules of Practice and Procedure and its advisory committees on rules.[8]

The Committee has every expectation that the Chief Justice will remain true to his word.

* * *

Section 12. Conformity with Rules of Appellate Procedure

Due to recent changes in the Rules of Appellate Procedure, conforming amendments to section 2107 of title 28, United States Code, are necessary.

First, section 12 strikes two paragraphs that are no longer applicable.

Second, section 12 creates a new section 2107(c) of title 28, United States Code, to provide that a district court may, upon motion filed not later than thirty days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. Additionally, if the district court finds, first, that a

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[8] Letter from Hon. William H. Rehnquist to Hon. Peter W. Rodino, Jr. (dated Oct. 19, 1988), reprinted at 134 Cong. Rec. H 10441 (daily ed. Oct. 19, 1988).

party entitled to notice of the entry of a judgment or order did not receive such notice from the **1310 clerk or any party within twenty-one days of its entry, and, second, that no party would be prejudiced, then the court may reopen the time for appeal for a period of fourteen days from the date of entry of the order reopening the time for appeal. The court must act upon motion filed within one-hundred and eighty days after entry of the judgment or order or within seven days after receipt of notice of the entry of judgment or order, whichever is earlier.

The first sentence of new subsection (c) uses language almost identical to that in the first sentence of current Rule 4(a)(5), Federal Rules of Appellate Procedure. The remainder of the language is almost identical to that found in proposed Rule 4(a)(6), Federal Rules of Appellate Procedure, which is scheduled to become effective on December 1, 1991.

* * *

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(C)(3) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill S. 1284, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

**1311 U.S. Congress,
Congressional Budget Office,
Washington, DC, November 6, 1991.

Hon. Jack Brooks,
Chairman, Committee on the Judiciary, House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1284, an act to make certain technical corrections in the Judicial Improvements Act of 1990 and other provisions of law relating to the courts, as ordered reported by the House Committee on the Judiciary on October 29, 1991.

S. 1284 would make a number of technical and clarifying amendments to Public Law 101–650, the Judicial Improvements Act of 1990, and to the judicial code. The legislation also would make two technical amendments to proposed modifications to the Federal Rules of Civil Procedure. We estimate that no cost to the federal government or to state or local governments would result from enactment of this legislation. Enactment of S. 1284 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mitchell Rosenfeld, who can be reached at 226–2860.

Sincerely,

Robert D. Reischauer,
Director.

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PART V–PROCEDURE

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CHAPTER 133–REVIEW
MISCELLANEOUS PROVISIONS

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S 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

[In any action, suit or proceeding in admiralty, the notice of appeal shall be filed within ninety days after the entry of the order, judgment or decree appealed from, if it is a final decision, and within fifteen days after its entry if it is an interlocutory decree.

[The district court may extend the time for appeal not exceeding thirty days from the expiration of the original time herein prescribed, upon a showing of excusable neglect based on failure of a party to learn of the entry of the judgment, order or decree.]

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for

appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds–

*17 (1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

This section shall not apply to bankruptcy matters or other proceedings under Title 11.

* * *

PL 111-16, May 7, 2009, 123 Stat 1607

UNITED STATES PUBLIC LAWS

111th Congress - First Session

Convening January 04, 2009

Additions and Deletions are not identified in this database. Vetoed provisions within tabular material are not displayed

PL 111-16 [HR 1626]
May 7, 2009
STATUTORY TIME-PERIODS TECHNICAL AMENDMENTS ACT OF 2009

An Act To make technical amendments to laws containing time periods affecting judicial proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

SEC. 6. AMENDMENTS RELATED TO TITLE 28, UNITED STATES CODE.

Title 28, United States Code, is amended–

* * *

<< 28 USCA § 2107 >>

(3) in section 2107(c), by striking "7 days" and inserting "14 days".

***1609**

* * *

SEC. 7. EFFECTIVE DATE.

The amendments made by this Act shall take effect on December 1, 2009.

Approved May 7, 2009.

PL 112-62, November 29, 2011, 125 Stat 756

UNITED STATES PUBLIC LAWS

112th Congress - First Session

Convening January 04, 2011

Additions and Deletions are not identified in this database. Vetoed provisions within tabular material are not displayed Vetoes are indicated by Text ; stricken material by ~~Text~~ .

PL 112–62 [S 1637]
November 29, 2011
APPEAL TIME CLARIFICATION ACT OF 2011

An Act To clarify appeal time limits in civil actions to which United States officers or employees are parties.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

<< 28 USCA § 1 NOTE >>

This Act may be cited as the "Appeal Time Clarification Act of 2011".

<< 28 USCA § 2107 NOTE >>

SEC. 2. FINDINGS.

Congress finds that--

(1) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure provide that the time to appeal for most civil actions is 30 days, but that the appeal time for all parties is 60 days when the parties in the civil action include the United States, a United States officer, or a United States agency;

(2) the 60–day period should apply if one of the parties is--

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States;

(3) section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure (as amended to take effect on December 1, 2011, in accordance with section 2074 of that title) should uniformly apply the 60–day period to those civil actions relating to a Federal officer or employee sued in an individual capacity for an act or omission occurring in connection with Federal duties;

(4) th. civil actions to which the 60–day periods should apply include all civil actions in which a legal officer of the United States represents the relevant officer or employee when the judgment or order is entered or in

which the United States files the appeal for that officer or employee; and

(5) the application of the 60–day period in section 2107 of title 28, United States Code, and rule 4 of the Federal Rules of Appellate Procedure--

*757

(A) is not limited to civil actions in which representation of the United States is provided by the Department of Justice; and

(B) includes all civil actions in which the representation of the United States is provided by a Federal legal officer acting in an official capacity, such as civil actions in which a Member, officer, or employee of the Senate or the House of Representatives is represented by the Office of Senate Legal Counsel or the Office of General Counsel of the House of Representatives.

SEC. 3. TIME FOR APPEALS TO COURT OF APPEALS.

Section 2107 of title 28, United States Code, is amended by striking subsection (b) and inserting the following:

<< 28 USCA § 2107 >>

"(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

"(1) the United States;

"(2) a United States agency;

"(3) a United States officer or employee sued in an official capacity; or

"(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.".

<< 28 USCA § 2107 NOTE >>

SEC. 4. EFFECTIVE DATE.

The amendment made by this Act shall take effect on December 1, 2011.

Approved November 29, 2011.
LEGISLATIVE HISTORY--S. 1637 (H.R. 2633):

HOUSE REPORTS: No. 112–199 (Comm. on the Judiciary) accompanying H.R. 2633.

CONGRESSIONAL RECORD, Vol. 157 (2011):

Oct. 31, considered and passed Senate.
Nov. 18, considered and passed House.